STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE PRUDEN and DAVID PRUDEN, Plaintiffs-Appellees,	UNPUBLISHED December 21, 1999
v	No. 211830 Jackson Circuit Court
RICHARD WALLACE MANTHEI, Defendant-Appellant.	LC No. 96-075276 NI

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff, Christine Pruden,[1] in this auto negligence action. We affirm.

On June 15, 1995, a motor vehicle accident occurred between plaintiff and defendant. On March 5, 1996, plaintiff filed this litigation alleging serious impairment of a bodily function due to defendant's negligent operation of his motor vehicle. On December 29, 1997, the videotape deposition of Dr. Kenneth Murkowski, plaintiff's chiropractor, was taken by the parties. Upon questioning by defense counsel, Dr. Murkowski acknowledged that he had published a book entitled *The Doctor's Guidebook to Personal Injuries and Deposition Risk Management*. Defense counsel acknowledged that he was familiar with the book by stating at the deposition, "Now I have the 8th Edition." Although the book was in its tenth printing, defense counsel proceeded to ask Dr. Murkowski about specific excerpts from the eighth edition. Defense counsel initially asked about the exaggeration of whiplash symptoms as cited in the book. Dr. Murkowski responded that he would need to examine the text itself because the book was a collaboration, and he did not want to take a statement out of context. Defense counsel did not show any excerpt[2] of the book to Dr. Murkowski, but purportedly read another portion of the book to him which addressed soft tissue injuries. Dr. Murkowski responded that the statement was accurate, but he could not attest to the correctness of the reading because he had not seen the text and did not contribute to that portion of the book. Dr. Murkowski acknowledged that he was listed as "the" author of the book, but noted that defense counsel was missing a page, which presumably contained acknowledgments. Dr. Murkowski proceeded to mention the names of his collaborators.

Defense counsel proceeded to read additional portions of the book into the record which addressed insurance rules, worker's compensation claims, prognosis, and trial preparation. At no time during this "questioning" did defense counsel inquire whether Dr. Murkowski had written the relevant portions read to him. Dr. Murkowski stated that the book should be admitted as evidence because defense counsel was taking statements out of context, and the information contained within the book had no bearing on plaintiff's injuries. Initially, Dr. Murkowski stated that he did not provide a copy of the book because he was not asked to do so, and he believed that he was being deposed to discuss plaintiff's treatment. After the antagonistic exchange with defense counsel, Dr. Murkowski stated that he could not provide a copy of the tenth edition of the book to defense counsel because he was not a chiropractor and did not attend a twelve-hour seminar.

Trial commenced on January 5, 1998, a mere seven days following the completion of Dr. Murkowski's video deposition. There is no indication in the record that defense counsel moved to compel plaintiff to produce a copy of Dr. Murkowski's book. At trial, plaintiff's counsel orally moved to exclude the portion of Dr. Murkowski's testimony wherein the book was discussed. Plaintiff's counsel cited to defense counsel's failure to lay a proper foundation for cross-examination when it had not been established that the statements were written by Dr. Murkowski. Defense counsel stated that initially Dr. Murkowski acknowledged "publication" of the book but now "seemed" to disavow portions of the book. Defense counsel stated that his cross-examination was adequate and that the testimony should be presented to the jury. The trial court held that the testimony had to be excluded because Dr. Murkowski had denied writing the excerpts of the book about which he was questioned.

At the conclusion of the jury trial, a verdict of $100,000 was rendered in favor of plaintiff. Defendant moved for a new trial or judgment notwithstanding the verdict. At the hearing on the motion, defense counsel presented a copy of the book to the trial court and noted that there were no other authors listed. Defense counsel, for the first time on the record, asserted that it was necessary to cross-examine Dr. Murkowski regarding the book to show his bias and self-interest. Defense counsel also asserted that the denial of the writing was inconsistent with his initial statement claiming authorship, and therefore, the book was a permissible area of cross-examination in order to attack Dr. Murkowski's credibility. Defense counsel sought a new trial by asserting that Dr. Murkowski's denial of authorship essentially constituted a fraud upon the court. The trial court denied the motion, holding that the book was unavailable when it rendered its ruling excluding the testimony and that the evidentiary ruling had no bearing on the jury's decision.

Defendant first argues that the trial court erred in excluding Dr. Murkowski's testimony regarding his authorship of the book. We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). "[I]ssues regarding the admission or exclusion of evidence are properly preserved by a timely objection on the record." *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990). Where the trial court excludes evidence, an offer of proof must be made known to the trial court. *Id.* at 83-84; MRE 103(a)(2). Error may not

be predicated upon the ruling excluding evidence where an offer of proof has not been made unless the content was apparent from the questions asked. MRE 103(a)(2).

In the present case, the content of the testimony was preserved in the videotape deposition. However, in arguing for admission of the disputed testimony, defendant failed to correlate the preserved deposition testimony to the rule of evidence which allowed for admission. Rather, defendant merely argued that it was "fair testimony" without providing a basis for its use. Defendant's "offer of proof," at this stage of the proceeding, was insufficient to advise the trial court of a proper basis for admission of the disputed testimony. Because defendant failed to identify a specific purpose for the use of the disputed testimony and extrinsic impeachment may not occur on a collateral matter, *Lenzo v Maren Engineer Corp*, 132 Mich App 362, 364; 347 NW2d 32 (1984), the trial court's exclusion of the evidence was proper.

At the hearing regarding the motion for a new trial and on appeal, defendant argues that the disputed testimony was admissible pursuant to MRE 613, which provides:

> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.
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> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

The disputed testimony was not admissible pursuant to MRE 613(a) because defendant failed to identify how the disputed testimony was consistent with earlier statements and also did not show the excerpts to Dr. Murkowski when he requested disclosure of the book excerpts.

Defendant argues that the disputed testimony was admissible pursuant to MRE 613(b) as a prior inconsistent statement. However, defendant failed to comply with the provisions for admission. Specifically, defendant did not give Dr. Murkowski the opportunity to explain or deny any inconsistencies in statements. MRE 613(b). Rather, defendant merely read portions of the book into the record and sought an affirmative response from Dr. Murkowski that his reading of the text was accurate. Defense counsel did not ask Dr. Murkowski to explain whether he had written that specific portion of the text. The trial court did not abuse its discretion in excluding the evidence where defendant failed to lay a proper foundation for the impeachment evidence. *Davidson, supra*.

Defendant also argues on appeal that the evidence was admissible to demonstrate bias or self-interest. As previously stated, extrinsic evidence may not be used to impeach a witness on a collateral matter. *Lenzo, supra*. Bias of a witness is not a collateral matter, and extrinsic evidence may be

offered to show bias. *People v Rosen*, 136 Mich App 745, 759; 358 NW2d 584 (1984). However, defense counsel failed to make any correlation between the text of the book, and any bias of Dr. Murkowski. Defendant seemingly read the portions of the text into the record during the deposition to imply that Dr. Murkowski had written, essentially, a "how to" manual for recouping damages for whiplash or soft tissue injuries. Defendant never asked Dr. Murkowski whether he utilized the theories set forth in the book in the treatment and care of plaintiff. Furthermore, defendant could have avoided the consequences of Dr. Murkowski's denial of authorship of portions of the text by simply inquiring whether Dr. Murkowski adhered to and put into practice the portions of the text which he did not author. In light of the deficiencies in the "cross-examination" of Dr. Murkowski, we cannot conclude that the trial court abused its discretion in excluding the disputed testimony. *Davidson*, *supra*. Even if we could conclude that the admission of evidence was erroneous, a verdict will not be set aside unless refusal to take this action is inconsistent with substantial justice. MCR 2.613(A); *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998). In light of the three other experts which testified regarding the nature and extent of plaintiff's injuries, an erroneous evidentiary ruling would have been harmless under the circumstances.[3]

Defendant next argues that the trial court abused its discretion in denying the motion for a new trial where Dr. Murkowski perpetrated a fraud upon the court by denying authorship of the book. We disagree. The trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Because defendant's claim, that Dr. Murkowski perjured himself, is dependent upon newly discovered evidence, specifically, the production of the book, the motion is treated as a motion for new trial based on newly discovered evidence. *Stallworth v Hazel*, 167 Mich App 345, 353; 421 NW2d 685 (1988). A motion for new trial based on newly discovered evidence may be granted only if the newly discovered evidence could not, with reasonable diligence, have been discovered and produced at trial. *Id.*; MCR 2.611(A)(1)(f). Defendant was aware of Dr. Murkowski's denial of authorship of portions of the book in question prior to trial. Therefore, this information cannot be classified as newly discovered. *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971). Upon learning of Dr. Murkowski's denial, defendant could have moved to compel the production of the book and for adjournment of trial. However, there is no evidence in the record that defendant took such action. Furthermore, we note that defendant did not include a copy of the book it obtained in the record on appeal. Therefore, we cannot conclude whether the book allegedly solely authored by Dr. Murkowski was the eighth or tenth edition. Our review is limited to the record provided on appeal, and we will not consider any alleged evidence which is not supported by the record presented for our review. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Accordingly, we cannot conclude that the trial court abused its discretion in denying defendant's motion for new trial.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] David Pruden, Christine's husband, joins her as a plaintiff. Because his claim involved a loss of consortium for which he did not recover damages, we refer to Christine Pruden only as plaintiff.

[2] Apparently, at the time of the deposition, defense counsel only had Xeroxed copies of excerpts of the book.

[3] Defendant also argued that the trial court erred in applying the best evidence rule and that a de novo standard of review should be applied to this transgression. Review of the trial transcript reveals that the trial court did not apply the best evidence rule, but noted that Dr. Murkowski was in the best position to determine the portions of the book which he had authored, and defendant could not dispute that assertion without possession of the actual book. Accordingly, the contention that the trial court applied the best evidence rule is not substantiated by the record.